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No. 02-451

In the Supreme Court of the United States

AMPARO HERNANDEZ-GOMEZ,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Arizona Court of Appeals correctly held that, under *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), petitioner's tort claim challenging an automobile manufacturer's choice of an occupant restraint system compliant with Federal Motor Vehicle Safety Standard 208 is preempted by federal law.

RULE 29.6 STATEMENT

Respondent Volkswagenwerk AG (sued as Volkswagen Aktiengesellschaft (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. No publicly held company owns 10% or more of VWAG's stock. Respondent Volkswagen of America, Inc., is a wholly owned subsidiary of VWAG and has issued no publicly traded shares.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

In *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), this Court held that common law tort claims challenging an automobile manufacturer's choice among the "[o]ccupant crash protection" options in Federal Motor Vehicle Safety Standard ("FMVSS") 208 are preempted by federal law. FMVSS 208, this Court explained, embodies the decision of the National Highway Traffic Safety Administration ("NHTSA") that "safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (citing Brief for United States as *Amicus Curiae* 25) (emphasis in original). This Court determined that where, as with FMVSS 208, the federal government has "deliberately sought variety," no state requirement, including one imposed through common law tort litigation, may limit a manufacturer's choice. *Id.* at 878.

Faithfully following *Geier*, the Arizona Court of Appeals correctly concluded that petitioner's challenge to Volkswagen's decision to use a fully passive occupant restraint system, rather than manual lap belts, in the 1981 Rabbit was preempted by FMVSS 208. This decision was not only mandated by *Geier* but is consistent with every case since *Geier* to consider the issue. The petition fails to present any issue that could plausibly warrant this Court's review.

STATEMENT

As this Court explained in *Geier*, the regulatory history of FMVSS 208 is critical to the preemptive effect of that safety standard. The petition fails to present this history, and in particular the extensive evidence that NHTSA desired manufacturers to use a wide variety of occupant crash protection systems – including the system included in petitioner's vehicle – to comply with FMVSS 208. Therefore, before pre-

senting the history of this litigation, we discuss this background in some detail.

A. The History Of The 1980 Version Of FMVSS 208.

Congress enacted the National Traffic and Motor Vehicle Safety Act ("Safety Act"), 15 U.S.C. § 1381 *et seq.*,[1] in 1966, to protect the public against the "unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against [the] unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). It sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. *Id.* at 1392(a), 1392(f)(3). NHTSA has promulgated numerous standards on motor vehicle performance and design under the Safety Act, including FMVSS 208.

FMVSS 208 provides for "[o]ccupant crash protection." In its initial (1967) incarnation, it required manual seat belts in all automobiles. See *Geier*, 529 U.S. at 875. Because occupants refused to wear these seat belts, in 1970 NHTSA began to consider "passive restraints" that did not require any intervention by the occupant, such as airbags and automatic seatbelts. See *ibid.* Thus, commencing with the 1973 model year, NHTSA afforded manufacturers a choice among three options to comply with FMVSS 208 (see Notice, 37 Fed. Reg. 3911, 3912 (Feb. 24, 1972)) – "First Option," a "complete passive protection system" (see Notice, 36 Fed. Reg. 4600, 4604 (Mar. 10, 1971)); "Second Option," a "head-on passive protection system" (see 37 Fed. Reg. at 3912); or "Third Option," a "lap and shoulder belt protection system

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[1] Like petitioner (see Pet. 2 n.1), we cite to the pre-recodification version of the Safety Act.

with ignition interlock and belt warning" (*ibid.*). To further expand the choices available, NHTSA did not specify the exact methods by which manufacturers could comply with any of these options. See *King* v. *Ford Motor Co.*, 209 F.3d 886, 890, 892 (6th Cir.), cert denied, 531 U.S. 960 (2000).

Most automobile manufacturers chose to implement systems that complied with Option 3. However, this ignition interlock system – which prevented an automobile from being started if the driver was not wearing a seatbelt – proved to be such a "fiasco" (*Geier*, 529 U.S. at 879) that Congress forbade NHTSA from requiring such systems. See *id.* at 876 (citing 88 Stat. 1482). Option 3 was thereafter rewritten without the ignition interlock. See Final Rule, 39 Fed. Reg. 38,380 (Oct. 31, 1974).

In 1976, Secretary of Transportation Coleman issued a Notice of Proposed Rulemaking to consider the future of mandatory passive-restraint systems. See 41 Fed. Reg. 24,070 (June 14, 1976). He pointed out that NHTSA "anticipated that passive restraints might eventually become required equipment" (*id.* at 24,070) for two reasons: first, because such systems "would perform more effectively in preventing injuries than would seat belts, and second, because seat belts are not used consistently, passive restraints, which require no action by the occupant, would ensure more widespread crash protection." *Ibid.* On the other hand, he acknowledged that numerous factors cautioned against a regulatory mandate, including "[q]uestions of effectiveness, cost, and suspected hazards, as well as the philosophical problems of restricting individuals' freedom of choice with regard to how much they pay for safety protection" (*ibid.*), "difficult" questions "of assessing and comparing the safety benefits and costs of alternative occupant restraint systems" (*ibid.*), the "exist[ence of] only limited field experience with passive restraint systems" (*id.* at 24,073), and the lack of knowledge

about "how the general public would react to passive belts" and airbags (*id.* at 24,074).[2]

After extensive consideration, Secretary Coleman decided to institute "a large-scale demonstration program to exhibit the effectiveness of passive restraints" (Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection*, at 6 (Dec. 6, 1976) (the "Coleman Decision")), rather than mandate that manufacturers choose one specific option for their vehicles. He made this decision because of "the public's unfamiliarity with, and suspicion of, passive restraints" (*id.* at 1-2), "effectiveness, reliability, cost, [and] governmental interference" objections to mandatory passive-restraint systems (*id.* at 4), and worries about "public acceptance of passive restraints" (*id.* at 52), as well as "to encourage further advances in * * * promising [passive-restraint] technology" (*id.* at 25).

Seven months later, incoming Secretary of Transportation Adams rescinded the Coleman Decision and decided instead to institute a "phase-in" of mandatory (Option 1) passive restraint requirements, with passive-restraint systems initially mandated for certain vehicles in the 1982 model year and for all vehicles in the 1984 model year. See Final Rule, 42 Fed. Reg. 34,289 (July 5, 1977). The decision to create a phase-in, rather than requiring that manufacturers institute passive systems immediately, was made because of concerns about "re-

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[2] Secretary Coleman specifically discussed and praised the then-newly-introduced passive-belt system in the Volkswagen Rabbit – the precise restraint system that petitioner is now challenging – which was one of the first passive systems available on the general market. See 41 Fed. Reg. at 24,070 n.3, 24,072. In fact, a long line of Secretaries of Transportation have lauded the use of the passive-belt system that was installed in petitioner's vehicle. See *ibid.* (Secretary Coleman); 42 Fed. Reg. 34,289, 34,295 (July 5, 1977) (Secretary Adams); 49 Fed. Reg. 28,962, 28,999 (July 17, 1984) (Secretary Dole).

liability problems" of individual systems (*id.* at 34,294), because of "doubt that a large proportion of [consumers] would find passive belts acceptable" (*id.* at 34,295), "to obtain experience with these systems in the hands of a more limited segment of the public, and to obtain feedback on the performance and reliability of the systems" (*ibid.*). This 1977 Final Rule, requiring that cars manufactured before August 31, 1981 meet one of the three Options, was unchanged in the 1980 version of FMVSS 208, and applied to petitioner's 1981 Volkswagen Rabbit. See *id.* at 34,297 (requiring that cars manufactured before August 31, 1981, "shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3").[3]

B. The 1984 Version Of FMVSS 208 At Issue In *Geier*.

Because petitioner attempts to distinguish *Geier* – which involved the 1984 version of FMVSS 208 rather than the 1980 version that applied to her vehicle – we briefly describe the post-1980 history of the Safety Standard.[4] After petitioner's automobile was manufactured, NHTSA delayed, and

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[3] In this Final Rule NHTSA also explained that Volkswagen had agreed to take part in Secretary Coleman's demonstration program using the passive-belt system in its VW Rabbit and that NHTSA "anticipate[d] that the manufacturers which were parties to the earlier demonstration program agreements [would] continue their current preparations for voluntary production of passive restraints" despite NHTSA's cancellation of that program. 42 Fed. Reg. at 34,295.

[4] Petitioner has abandoned the claim she pressed in the lower courts that the minimal differences between the 1980 version of FMVSS 208 applicable to her vehicle and the 1984 version of FMVSS 208 at issue in *Geier* can be used to differentiate the two cases (see Pet. 14). Instead, she now focuses on the fact that her litigation involves manual lap belts whereas the claim in *Geier* involved air bags. We explain below (at 11-12) why this distinction is irrelevant.

then rescinded, the phase-in of mandatory Option 1 passive restraints. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 38 (1983). This Court found that rescission to be inadequately explained (*id.* at 34) and remanded to the agency for further consideration.

NHTSA's reconsideration of FMVSS 208 led to the 1984 version of the standard at issue in *Geier*. The 1984 standard is, in all material respects relevant to this case, a verbatim reproduction of the version applicable between 1977 and 1981. Insofar as the issues in this case are concerned, the sole substantive change between the 1980 version and the 1984 version of FMVSS 208 is that while the earlier regulation envisioned the phase-in of mandatory Option 1 passive systems commencing in the 1982 model year (see 1980 FMVSS 208 S4.1.2, S4.1.3), the later version envisioned the phase-in of mandatory Option 1 passive systems commencing in the 1987 model year (see 1984 FMVSS 208 S4.1.3, S4.1.4).

C. Petitioner's Accident And Lawsuit.

1. Petitioner Amparo Hernandez-Gomez "sustained severe injuries when the 1981 Volkswagen Rabbit in which she was riding * * * veered off the road, flipped over, and landed on its roof." Pet. App. 1. The vehicle's "[o]ccupant crash protection" system consisted of an automatic shoulder belt, a specially designed anti-submarining seat, and an energy-absorbing knee bolster. *Id.* at 20. It is undisputed that this system complied fully with Option 2 of the 1980 FMVSS 208. See Passive Belt Release Mechanism, 39 Fed. Reg. 3834, 3834 (Jan. 30, 1974) ("option two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's"); Pet. 18 n.17.

2. Petitioner sued, arguing that Volkswagen should have installed a manual lap belt – an active restraint – in the vehicle, even though the restraint system installed in her vehicle fully complied with the fully passive Option 2 of FMVSS 208, which did not require such a belt. The trial court found

her claims to be impliedly preempted by the Safety Act and FMVSS 208. Pet. App. 17. The Arizona Supreme Court disagreed, holding that the claims were not expressly preempted and that where an express preemption provision exists courts should not engage in an implied preemption analysis. *Id.* at 32, 38. This Court vacated that decision in light of its holding, in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), that the existence of an express preemption provision does not preclude finding a claim to be impliedly preempted. Pet. App. 40. The Supreme Court of Arizona thereafter found petitioner's claims to be neither expressly nor impliedly preempted, and remanded the cause for trial. See *id.* at 62.

3. The jury found for petitioner and awarded her $3.1 million. Volkswagen appealed, continuing to assert that petitioner's claims were preempted. See Pet. App. 3 ("Volkswagen has consistently argued that federal law preempted plaintiff's state tort claim"). After oral argument but before the court of appeals rendered its decision, this Court decided *Geier*. The court of appeals therefore ordered supplemental briefing to consider the effect of *Geier* on this case (see *id.* at 5) and concluded that, despite the earlier decisions of the Arizona Supreme Court, it was obligated by *Geier* to find petitioner's claims preempted.

After reviewing this Court's decision in *Geier*, the Arizona Court of Appeals held that "[t]he Court's analysis in *Geier* leads to" a finding of preemption in the instant case. Pet. App. 7. The court below explained that Volkswagen had chosen an Option 2 system, which did not require a lap belt. If petitioner's claim that her automobile was defectively designed because it did not have a lap belt were accepted, it "would impose a duty on Volkswagen to include that belt in all such vehicles to avoid tort liability. Accordingly, as in *Geier*, petitioner's common-law tort claim presents an 'obstacle to the variety and mix of devices that FMVSS 208 sought,' and is implicitly preempted." *Id.* at 7 (quoting *Geier*,

529 U.S. at 881) (internal alterations omitted).[5] The court of appeals therefore vacated the judgment in petitioner's favor. *Id.* at 12.

The Supreme Court of Arizona granted review but, after briefing and oral argument, vacated that grant of review as improvident (see Pet. App. 13-15) – thus rendering the decision of the court of appeals final.

REASONS FOR DENYING THE PETITION

This case does not warrant further review. The decision below, rendered by an intermediate state appellate court, is plainly correct and does not conflict with the decision of any other court. Since *Geier*, every court to consider the issue has held that, because the federal government "deliberately sought variety" (529 U.S. at 878) in implementing FMVSS 208, that standard preempts any tort claim that would restrict a manufacturer's choice among occupant restraint systems that comply with the federal safety standard.

I. THE DECISION BELOW IS COMPELLED BY THIS COURT'S DECISION IN *GEIER*.

Petitioner's principal argument (Pet. 12-20) is that the decision below conflicts with *Geier*. This argument is frivolous. The Arizona Court of Appeals faithfully followed *Geier* in its analysis of petitioner's claims and in finding those claims to be impliedly preempted by FMVSS 208.

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[5] The court also rejected petitioner's claim that the fact that FMVSS 208 "did not expressly prohibit manufacturers from adding other safety equipment to any of the available options" (Pet. App. 8) precluded a finding of preemption in this case. The court instead "read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among those options and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option." *Ibid.*

A. Petitioner's rationale for asserting that the decision below conflicts with *Geier* is a straw man: according to petitioner, "[t]he court below * * * has found implied preemption compelled by *Geier* solely because the federal standard contained three regulatory options and because Volkswagen complied with one." Pet. 12; see also *id.* at 18. This is a misstatement of the holding of the court of appeals. Rather, as in *Geier*, the court below found that "plaintiff's common-law tort claim presents 'an obstacle to the *variety and mix of devices* that FMVSS 208 sought.'" Pet. App. 7 (quoting *Geier*, 529 U.S. at 881) (emphasis added; internal alterations omitted). It was NHTSA's desire for a diverse array of systems that preempted the claims in *Geier* and that preempts petitioner's claims in this case.

As this Court explained in *Geier*, where the federal government has "deliberately sought variety," no state requirement, including one imposed through common law tort litigation, may limit a manufacturer's choice. 529 U.S. at 878. FMVSS 208 is one such situation, because NHTSA "*deliberately provided the manufacturer with a range of choices among different passive restraint devices.* Those choices would bring about a *mix of different devices* introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives." *Id.* at 875 (emphasis added); see also Pet. 15.[6]

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[6] See also 529 U.S. at 879 (NHTSA was worried about "backlash" from a mandatory rule; wanted to "develop data" on comparative effectiveness; hoped that allowing various options would "overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems." Finally, the agency hoped the gradual phase-in allowing a variety of systems

In deciding this case, the court of appeals followed the unambiguous holding in *Geier* that FMVSS 208 preempts tort claims that would impose liability on a manufacturer for choosing one rather than another option set forth in the federal standard. In *Geier*, the manufacturer chose an Option 3 restraint system, which consisted of manual belts, rather than an airbag; in this case, the manufacturer chose an Option 2 fully-passive system, which consisted of an automatic shoulder belt, a specially designed anti-submarining seat, and an energy-absorbing knee bolster, rather than a manual lap belt. In either case, the imposition of liability based on that choice would take away the "variety and mix of devices that FMVSS 208 sought" and that was essential to the success of the government's safety program. See Pet. App. 7. Simply stated, petitioner's claim that Volkswagen had to include a manual lap belt in her automobile would have prevented manufacturers from developing fully-passive restraint systems that did not rely on the controversial airbag technology.[7] Thus, there is no basis for petitioner's assertion that the decision below centered on the mere existence of choices in FMVSS 208 – rather than on NHTSA's policy of seeking diversity among restraint systems – and no inconsistency between this decision and *Geier*.

"would * ** build public confidence, necessary to avoid another interlock-type fiasco.") (citation omitted).

[7] As we explained above (at note 1), NHTSA specifically approved of the VW restraint system and identified it as an important part of the mix under FMVSS 208. That in 1974 NHTSA told VW that it *could* incorporate manual lap belts into its vehicles (Pet. 8) is entirely beside the point. A state rule *requiring* VW to do so would undermine NHTSA's desire to have a variety of systems implemented, and in particular to have completely passive systems developed. Otherwise, state law could similarly have required Honda to add an air bag to the vehicle at issue in *Geier*, because Honda certainly could have done so voluntarily.

B. Perhaps realizing that her primary argument is insubstantial, petitioner attempts to distinguish this case from *Geier* based on the details of the specific occupant restraint system at issue in each case. According to petitioner, this Court found preemption in *Geier* based on "special factors [unique to a 'no airbag' claim that] are not present in, and have absolutely no application to, common-law suits based on the failure of manufacturers to include *lap seat belts*, rather than airbags, in their cars." Pet. 14-15 (emphasis in original). Specifically, petitioner asserts that it was NHTSA's desire to "hold back the deployment" of airbags (*id.* at 16) that led to preemption in *Geier*. By contrast, petitioner contends that NHTSA has always favored the universal provision of seat belts. *Ibid.*

This effort to cobble together a conflict fails for two distinct reasons. First, the assertion that NHTSA's desire for a "variety" of "*alternative* protection systems" (529 U.S. at 878, 881 (emphasis in original)) applied only to one option among the set of authorized options – airbags – is both logically incoherent and factually inaccurate. Litigation precluding the design used in either vehicle would limit the mix of systems implementing FMVSS 208, and thus would conflict with NHTSA's desire that manufacturers develop the widest variety of systems. See pages 3-5, *supra*; *Geier*, 529 U.S. at 881. And the reasons given for finding preemption in *Geier* had little to do with airbags and everything to do with not frustrating NHTSA's goal of ensuring that a *variety* of safety restraint systems be developed, tested, and introduced. In particular, the phase-in, on which this Court relied, applied to *any* form of passive-restraint system, not just airbags. See *ibid.*

Second, petitioner's assertion that NHTSA has always favored the widest possible provision of manual seat belts ignores the background of FMVSS 208 and is at best misleading. Historically, very few people *used* manual seat belts. See, *e.g.*, NHTSA, *Automobile Occupant Crash Protection:*

Progress Report No. 3, at 4 (July 1980) ("In 1979 only about 11 percent of all car drivers used the available belts."); page 2, *supra*. NHTSA therefore sought to encourage manufacturers to develop *fully-passive* restraint systems, such as the one installed in petitioner's vehicle. Thus, the original version of Option 1 in FMVSS 208 *required* that vehicles certified under that option *not* rely on manual seat belts to meet its performance requirements. See Occupant Crash Protection in Passenger Cars, Multipurpose Passenger Vehicles, Trucks, and Buses, 36 Fed. Reg. 4600, 4601 (Mar. 10, 1971).[8] The point was to develop systems – such as the one installed in petitioner's Volkswagen Rabbit – that did not require any intervention by the user.

The VW system, which under FMVSS 208 S4.5.3 used a completely passive system to comply with Option 2, was plainly authorized by FMVSS 208 (see Passive Belt Release Mechanism, 39 Fed. Reg. 3834, 3834 (Jan. 30, 1974)) and was repeatedly lauded by NHTSA as an important step forward in the development of passive restraints because of its lack of a manual lap belt. See note 1, *supra*. In fact, NHTSA concluded that "the rate of fatalities in Rabbits equipped with passive belts is *less than one-third* of the rate for Rabbits of the same years of manufacture equipped with active lap/shoulder belt systems." Final Rule, 42 Fed. Reg. 61,466, 61,467 (Dec. 5, 1977) (emphasis added). Thus, the claim that NHTSA uniformly favored the inclusion of manual seat belts is demonstrably false, and the agency's decision to authorize (and encourage) systems without manual belts among those that complied with FMVSS 208 was completely justified.

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[8] The provision *allowing* the use of manual belts (S4.1.2.1(c)) to meet Option 1 was added later, when it became clear that the goal of fully passive restraint systems complying with Option 1 might be too ambitious. See Occupant Crash Protection, 39 Fed. Reg. 10,271, 10,271 (Mar. 19, 1974).

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS OVER THE PREEMPTIVE EFFECT OF FMVSS 208.

Petitioner's attempt to manufacture disarray among the lower courts following *Geier* is singularly unsuccessful. The decision below is consistent with that of every court since *Geier* to consider the preemptive effect of FMVSS 208. Although a few cases *predating Geier* would have found claims similar to petitioner's not to be preempted,[9] those cases have no validity following *Geier*, and in any event cannot logically be said to create a conflict over the meaning of *Geier*. Decisions finding unrelated regulatory schemes not to be preemptive also do not conflict with the decision below, because the case law uniformly accepts the proposition that FMVSS 208 is distinct.

A. Petitioner is unable to identify a single decision post-dating *Geier* in which a court has found a tort claim challenging a manufacturer's choice among occupant restraint systems not to be preempted by FMVSS 208. In fact, the lower courts are uniform in holding that FMVSS 208 preempts such claims because of NHTSA's policy of encouraging manufacturers to implement that standard using a variety of occupant restraint systems.

Thus, as petitioner acknowledges (see Pet. 25), the Eleventh Circuit has on two occasions since *Geier* found FMVSS 208 to preempt common law claims challenging a manufacturer's choice under FMVSS 208. For example, in *Griffith* v. *General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), the

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[9] Most precedent pre-dating *Geier* found such claims to be preempted. See, *e.g.*, *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Gentry* v. *Volkswagen of Am., Inc.*, 521 S.E.2d 13, 17 (Ga. Ct. App. 1999) ("to the extent that the [plaintiffs] allege as a design defect a failure to include a lap belt, that claim is preempted by federal law").

court concluded that, under *Geier*, "a suit seeking to impose liability on a car or truck manufacturer for selecting a vehicle restraint system specifically authorized by FMVSS 208 is in conflict with and impliedly preempted by it." *Id.* at 1280. The court explained that in FMVSS 208 NHTSA intended to "deliberately design a regulatory scheme which provides specific passenger restraint options, no one of which would state law be free to foreclose" (*id.* at 1281), and thus that litigation challenging the choice among those options is impliedly preempted. See also *James* v. *Mazda Motors Corp.*, 222 F.3d 1323, 1325-1327 (11th Cir. 2000), cert. denied, 532 U.S. 921 (2001) (finding litigation challenging a manufacturer's choice among options under FMVSS 208, specifically the choice not to include an automatic lap belt or air bag, to be preempted; "[a] suit against [a defendant] for [its] exercise of an option provided to [it] by FMVSS 208 conflicts with federal law and, thus, is impliedly preempted") (citation and internal quotation marks omitted).

Similarly, in *Hurley* v. *Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000), cert. denied, 531 U.S. 1148 (2001), the Seventh Circuit held that the claim that a bus should have included a lap belt, air bag, and structural support – rather than merely a two-point seat belt option authorized under FMVSS 208 – was preempted. See Pet. 25-26. According to the Seventh Circuit, "*Geier* confirms * * * that a state lawsuit that forecloses an option left open by FMVSS 208 is * * * preempted." *Hurley*, 222 F.3d at 382.

Finally, as the petition again acknowledges (at 26), the Fourth Circuit held that *Geier* preempts claims based on a manufacturer's choice of restraint system. See *Moser* v. *Ford Motor Co.*, 28 Fed. Appx. 168, 2001 WL 1387600, at *3 (4th Cir. Nov. 8, 2001), cert. denied, 122 S. Ct. 1540 (2002). According to this court, too, any claim that "would exclude [a] type of system from the range of available [systems that comply with FMVSS 208] * * * would frustrate the Depart-

ment of Transportation's goal of promoting a variety and mix of passive devices." *Ibid.*[10]

B. The only case cited in the petition that can even arguably be said to conflict with the decision below is *Hyundai Motor Co.* v. *Alvarado*, 974 S.W.2d 1 (Tex. 1998), which held that a claim challenging the lack of a manual lap belt was not preempted by FMVSS 208. See Pet. 22. But *Alvarado* predates *Geier*, as petitioner acknowledges (see Pet. 22 n.20), and the Arizona Court of Appeals' decision in this case turned critically on the meaning and scope of *Geier*.[11] See, *e.g.*, Pet. App. 8 ("the conclusion in *Hernandez-Gomez II* that federal law does not implicitly preempt plaintiff's state law tort claim is not compatible with *Geier*"); see also Pet. 8-9 (the decision below "rel[ied] entirely on this Court's * * * decision in *Geier*).

Furthermore, the Texas Supreme Court has itself implicitly recognized that *Alvarado* is inconsistent with *Geier*. In *Great Dane Trailers, Inc.* v. *Wells*, 52 S.W.3d 737 (Tex. 2001), the court found that FMVSS 108 – which specifies requirements for lamps and reflective devices – did not preempt state common law tort claims. In so doing, however, the court expressly and repeatedly distinguished FMVSS 208 from FMVSS 108. As the Texas Supreme Court explained,

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[10] See also *Carrasquilla* v. *Mazda Motor Corp.*, 166 F. Supp. 2d 169, 176 (M.D. Pa. 2001) (finding claim based on a manufacturer's choice not to include an automatic lap belt in a system that used an automatic shoulder belt and a manual lap belt to be preempted under *Geier*; "no matter how plaintiffs characterize their claim, they are attacking one of the specifically permitted passive restraint options under FMVSS 208") (alterations omitted).

[11] In fact, the Texas Supreme Court in *Alvarado* relied on the Arizona Supreme Court's 1996 decision *in this very case*, finding there not to be implied preemption (see 974 S.W.2d at 10; *id.* at 19 (Owen, J., dissenting)) – the very decision that the court below found (at Pet. App. 8-9) did not survive *Geier*.

"[u]nlike Standard 208 in *Geier*, which permitted alternative passive-restraint device standards, Standard 108 establishes only minimum conspicuity standards that states are free to strengthen through tort law." *Id.* at 745; see also, *e.g.*, *id.* at 741 (claims in *Geier* were preempted by FMVSS 208 because they "presented an obstacle to manufacturers using the variety and mix of passive-restraint devices that Standard 208 sought to promote and an obstacle to the gradual passive restraint phase-in that standard 208 deliberately imposed"). In sum, *Alvarado* has no continuing vitality.

C. Petitioner's final attempt to create a conflict among the lower courts rests on comparing cases addressing the preemptive effect of FMVSS 208 with cases addressing the preemptive effect of completely unrelated regulatory schemes. See Pet. 26-28. It is undisputed, however, that NHTSA's policy of encouraging variety in implementing FMVSS 208 is different from the vast majority of regulatory schemes, including even other Safety Standards. See, *e.g.*, *Wells*, *supra*. In FMVSS 208, NHTSA not only sought to provide manufacturers with a menu of acceptable options, but also affirmatively desired to have a variety of systems implemented under the safety standard. See *Geier*, 529 U.S. at 878; pages 4-5, *supra*. Lower courts have understood this distinct aspect of FMVSS 208, and therefore have rejected broad claims of implied conflict preemption based merely on the existence of choices while nonetheless acknowledging the preemptive effect of Standard 208. See, *e.g.*, Pet. App. 9-11; *Harris* v. *Great Dane Trailers, Inc.*, 234 F.3d 398, 400-401 (8th Cir. 2000) (differentiating FMVSS 108 from FMVSS 208); *Wells*, *supra*, 52 S.W.3d at 745 (same); *Leipart* v. *Guardian Indus., Inc.*, 234 F.3d 1063, 1070 (9th Cir. 2000) (distinguishing CPSA regulation from FMVSS 208); *Choate* v. *Champion Home Builders Co.*, 222 F.3d 788, 796 (10th Cir. 2000) (distinguishing claim under Manufactured Housing Act from FMVSS 208). There is therefore

no conflict between these decisions and those, such as this one, finding FMVSS 208 to preempt state law tort claims.

D. Petitioner's related claim that the decision below "directly conflicts" with the position on implied preemption that the United States has adopted in various *amicus* briefs (Pet. 24) is equally misguided. Petitioner quotes four *amicus* briefs in which the United States has expressed its view that the mere existence of options under a regulatory scheme generally is insufficient to require that scheme to preempt state law tort claims. See *id.* at 12, 19-21. These quotations are simply irrelevant to this case; the question here is not whether the mere existence of options is sufficient to preempt, but whether *FMVSS 208* is preemptive. These very same *amicus* briefs all stress that FMVSS 208 does not merely provide manufacturers with options, and that – as the court below held – it preempts state law tort claims such as petitioner's.

Thus, the government's *amicus* brief in *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), which petitioner quotes at length (at Pet. 20-21) explains in the very next paragraph why – as the court below held (at Pet. App. 7) – FMVSS 208 preempts claims such as petitioner's:

> What distinguishes this issue from most is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule would disserve the safety purposes of the Act. She therefore affirmatively sought to encourage manufacturers to use a variety of protection systems in their fleet. *It is that policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.*

Brief of the United States as *Amicus Curiae* in *Wood*, at 15 (emphasis added).

Similarly, the government's *amicus* brief in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), quoted at Pet. 21, ex-

plains (at 28) that even though the mere presence of options in a regulatory scheme would not be sufficient to preempt state tort actions, FMVSS 208 is different. "[T]he Secretary [of Transportation] concluded that, because of a history of substantial consumer resistance to automatic, or passive, occupant restraint systems, passenger safety would be best served by a diversity of such restraint systems." And in its brief in *Geier* – discussed at Pet. 21 – the federal government again argued (at 23) that FMVSS 208 preempts state law tort claims, because FMVSS 208 "encourag[ed] manufacturers to offer a variety of passive restraints." Finally, the United States' *amicus* brief in *Sprietsma* v. *Mercury Marine*, No. 01-706 – discussed at Pet. 12 – once more stresses that FMVSS 208 is preemptive because it embodies NHTSA's affirmative desire for a variety of occupant restraint systems:

> [T]the Court in *Geier* recognized that a federal "minimum safety standard" – which obviously reflects the agency's considered decision regarding the appropriate level of federal regulation – will not categorically preempt "nonidentical state standards established in tort actions covering the same aspect of performance." The *Geier* Court based its preemption holding not on a per se rule, but on a careful analysis of the pertinent safety standard [FMVSS 208] and the extent to which common-law liability would frustrate the purposes embodied in *that standard*.

Id. at 19-20 (citing *Geier*, 529 U.S. at 868) (emphasis added). In sum, there is absolutely no support for the assertion that the decision of the Arizona Court of Appeals conflicts with the views of the United States on the preemptive scope of FMVSS 208.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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